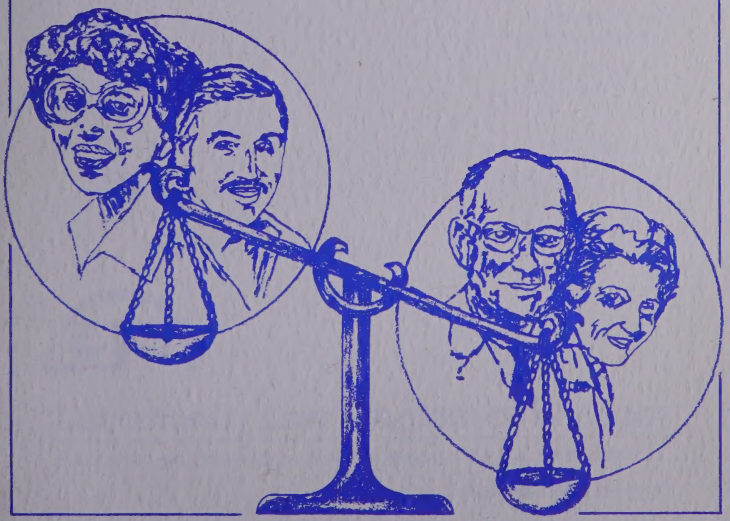
Law and the Native People of Ontario



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THE LAW
AND
THE NATIVE PEOPLE OF ONTARIO

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The Community Law Program has, since its inception, been committed to bringing high quality legal information in an understandable form to the general public. Understanding your legal rights and duties is the first step in avoiding or solving any problem in today's legally complex society.

In 1982, as in previous years the Community Law Program of Windsor has produced a series of booklets on several areas of law. For 1982 this series includes:

1) A Guide to the Canadian Charter of Rights and Freedoms
2) The Law and the Native People of Ontario
3) Compensations for Victims of Crime
4) Landlord and Tenant Law
5) Land Mortgages, Foreclosures and Powers of Sale
6) Senior Citizens and the Law

Each booklet covers the general area of law referred to in the title. While every attempt has been made to ensure that this booklet contains up-to-date legal information it may be outdated due to rapid changes in the law. This booklet does not contain a complete statement of the law, and it should not be regarded as providing legal advice for a specific problem you may have. Should you require such advice contact a lawyer, the legal aid office, or a legal information service.

NOTE

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INTRODUCTION AND ACKNOWLEDGMENTS

The purpose of this booklet is to give the reader an overview of general areas of law which specially affect Native people in Ontario. Certain areas which apply differently or which apply solely to Native people have been covered.

This booklet is not a complete and detailed explanantion of any one area of law. It is only a broad outline of some of the key rules which specially affect Native people.

Special thanks is extended to the University of Saskachewan's Native Law Centre and the Prince Albert Legal Assistance Clinic for the use of their materials. Also, the assistance of the Windsor Police Department and the Can-Am Indian Friendship Centre of Windsor was appreciated.

Community Law Program of Windsor
Native and The Law Project

TAXATION

The main rule about taxation and Native peoples is found in the Indian Act at section 87. It says that the personal property and reserve lands of Indians and Indian Bands are free from federal and provincial taxes. Since this main rule was made it has been left up to the tax people and the courts to make it work.

The first question to ask is, "What Indians and Indian Bands does this rule apply to?" The answer to this question is found in the Indian Act. It says that only Indians listed under the Indian Act are qualified for the special treatment of the rule. Indians listed under the Indian Act are those Indians that have always been registered, all male Indians and the wives of those males. Indian Bands that qualify for the special treatment are those Bands as defined in section 2(1) of the Indian Act. Such Bands are those that have had land set aside for their use and benefit or monies held by the government for their use and benefit.

There are few groups of Native people who do not qualify for special tax treatment. They are the Metis people, Indians who have lost their status or Indian corporations. An "Indian corporation" is a corporation where all members are Indians.

The next question is, "Even though I do not pay tax on my personal property, what do I pay tax on?" The answer to this question has been given by the courts and the tax people. They have said that all income earned by a Native person off a reserve is taxable. The problem with this answer is finding if the income has been earned off the reserve.

Both the courts and the tax people agree that there are different types of incomes. For example, there are wages, salaries, rental income, business income and interest on a bank account. Each one of these types of income is taxable if it is earned off a reserve. There are different, specific rules for each type of income to find out if it has been earned off a reserve.

Salaries and wages are earned where the work is done. It does not matter where the pay cheque comes from. If part of the work is done on the reserve and part off the reserve then only that part of the wages or salary which goes with the work from off the reserve is taxable. The other part of the wages or salary is tax free.

Income from a business is earned where the business is located. For example, if the business is a grocery store, then the income for that business is earned wherever that store is located.

Rental income is earned at the location of the place that is rented. Interest on a bank account is earned at the location of the bank where the money is.

The the type of income that you have has not yet been described then the general rule applies. The general rule is that the source of the income is where the money comes from. If the source is off the reserve then you must pay tax on it. This rule applies to unemployment insurance, old age security payments and student grants. These types of incomes are usually from some government agency or department.

Sales tax is another thing which has special rules that apply to Native people. If the item is sold on a reserve and the person selling it is an Indian living on that reserve there is no sales tax. Also, if an item is delivered to the reserve even though the sale was arranged off the reserve there will be no sales tax. In this case the person selling the item does not have to be an Indian from that reserve.

In Ontario there is no sales tax on telephone bills for telephones located on a reserve. Gasoline bought on or off a reserve for personal use is not subject to sales tax. But the system is set up so that the sales tax is paid at the time the gas is bought. Then the Native person fills out a form asking for the amount of sales tax that was paid to be returned.

The third type of tax that may interest you is customs duty. This is a tax that is paid on items that are brought into Canada from another country. Some Native people have pointed to the Jay Treaty and have said that they do not have to pay any customs duty. They were wrong. The Courts have said that the Jay Treaty does not give Native people the right to bring goods into Canada tax free. So far the courts have had the last word on this matter.

CRIMINAL LAW

What is criminal law? It is law made by the federal government to stop certain types of behaviour or actions from happening. The Criminal law is made by Parliament and is called the Criminal Code of Canada. The behaviour or actions which the government decides are criminal offences are the same everywhere you go in Canada. What is a criminal offence in British Columbia is also a criminal offence in Prince Edward Island and Ontario. All actions which are criminal offences must be written by Parliament and placed in the Criminal Code.

The governments of provinces, cities and Indian reserves may also make laws to discourage certain types of behaviour or action. These laws will also have fines and other punishments but are not called

criminal laws. An example of these types of law is speeding.

Criminal laws which are only made by the Federal government deal with the very serious offences, called "indictable offences" (examples of these are murder and rape) and also less serious offences, called "summary conviction offences" (an example is causing a disturbance). Besides the Criminal Code, there are other laws passed by the Federal government which deal with offences. These laws include the Narcotics Control Act (which deals with drugs), the Juvenile Delinquents Act (which deals with young people who break the law) and the Indian Act (which deals with the rights and duties of status Indians).

Who are the People in Court?

Suppose that John is charged by police officers with a criminal offence, say causing a disturbance. This is a summary conviction or a less serious criminal offence. John receives a summons, which is an order telling him to attend court on a certain date. John will have to go to Provincial Court and his trial will be held in front of a Judge of the Provincial Court.

The Judge

The Judge is the person who is in charge of the courtroom. He must make sure that the accused person

gets a fair trial. In Provincial Court, where the less serious offences are tried, the Judge decides if the accused person committed the crime. If the Judge decides the accused is guilty, the Judge will also decide the punishment to be given. If the accused is charged with a more serious criminal offence, a jury may be present. When a jury is involved, the Judge must tell the jury the law. The jury decides if the accused is guilty but the judge decides the punishment to be given.

The Crown Prosecutor

The Crown Prosecutor has the job of presenting to the court all the facts of the case. The Crown Prosecutor presents the facts to the Judge (or jury) if there is one). The Judge or jury decides if it is beyond a reasonable doubt that the accused person did commit the crime. The Crown Prosecutor is usually a lawyer but sometimes for the less serious offences a police officer acts as Crown Prosecutor.

The Defence Lawyer

When a person is charged with an offence he should call a lawyer to help him prepare to defend himself in court. A lawyer will give the accused advice on what to do and what to say to the police and in court.

The defence lawyer's job is to prevent the Crown from proving to the Court that it is beyond a reasonable doubt that the accused person committed the crime. In court, the defence lawyer may call and question witnesses, question witnesses called by the Crown Prosecutor and argue on behalf of the accused. If the person is found guilty, the defence lawyer will try to get a lighter sentence for the person than the Crown Prosecutor wants.

The defence lawyer is trying to help the accused person. What ever the accused person tells his defence lawyer will not be told to the police or anyone else. The defence lawyer will not tell what he is told by a person he is defending. THE DEFENCE LAWYER MUST BE TOLD THE TRUTH BY THE ACCUSED PERSON! He cannot prepare the defence unless he knows the truth. If the defence lawyer is not told the truth, the accused person is only hurting himself. The accused person, if found guilty, is the one who will pay the fine or go to jail not the defence lawyer.

Court Clerks

Clerks of the Court receive any documents given to the Court, mark any object presented to the Court and also call and swear in witnesses.

Bailiffs

Bailiffs carry out the orders of the court. They may be seen at the courtroom door and standing near the Judge. They may also assist people entering and leaving court.

Court Reporter

The Court Reporter writes down or records everything that is said or done in the Court.

Native Court Workers

Many Courts in the province have Native Court Workers. Their job is to help any Native person who is brought to Court. They can explain to the person what he is charged with, what is going to happen to the person and also how the Court process works. The Native Court Worker will also help the person get a lawyer. The Judge may also ask the Native Court Worker for information about the person which he will consider when deciding the case or setting the proper punishment.

Arrest

Arrest is one of the methods used to bring a person into court. Other methods will be discussed later. An arrest is complete when a police officer identifies himself as a police officer, tells the

person that he is under arrest and why he is under arrest and (unless the person agrees to the arrest) touches the person to show he is in custody. A police officer can use reasonable force to stop a person from running away or resisting the arrest.

A private citizen can also arrest a person. *If Frank catches John committing an indictable offence (a more serious crime) for example, breaking into Frank's house, Frank can arrest John and use as much force as necessary to stop John from escaping. Frank must turn John over to the police as soon as possible. This right of citizen's arrest should be used only very carefully. If Frank makes a mistake and arrests John for a summary conviction offence (a less serious crime) Frank can be sued by John and may be charged by the police. A citizen should only arrest a person who is committing an indictable offence (a more serious crime).*

When Can the Police Arrest Someone?

A police officer can arrest someone with or without an arrest warrant. An arrest warrant is issued by a Justice of the Peace or a Provincial Court Judge. A police officer will go to a Justice of the Peace and swear an Information. This paper will give the name of the person suspected of committing the crime and the reasons why the police officer believes that

the person committed the crime. After the warrant is issued, the police officer will arrest the named person.

If John is approached by an officer with a warrant for his arrest, John should ask to see the warrant and check to see if his name appears on it along with the offence he is accused of. If these both appear, John should go quietly with the officer.

The procedure for a police officer to arrest without an arrest warrant is different. A police officer without a warrant may arrest any person who has committed an indictable offence (a more serious offence) for example, robbery, or a person whom the police officer believes, on reasonable grounds, has committed or is about to commit an indictable offence. A police officer without a warrant may arrest any person who appears to be committing a crime. He will also arrest someone without a warrant when it is necessary to learn the identity of the person, get evidence of the offence or prevent the offence from occuring again.

When the police officer arrests a person the following must be read to the person:

I am arresting you for (the officer will give the reasons for the arrest)

and

> It is my duty to inform you that you have the right to retain and instruct counsel without delay. (This means that you can call and talk with a lawyer.

The police officer will ask the person if he understands. If the person does not understand he should say so.

At the police station, another warning is read to the person:

> You are charged with (the offence will be named here). Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence.

If the person <u>did not</u> commit the offence, he should say "I did not do it". A person should say nothing else until he has talked to a <u>lawyer</u> and <u>only</u> a lawyer. The person should take only the lawyer's advice!

The person will also be read the following:

> If you have spoken to any police officer or to anyone with authority or if anyone has spoken to you in connection with this case, I want it clearly understood that I do not want it to influence you in making any statement.

This means that the person should not believe any promises or threats that were made by anyone who was trying to get the person to make a statement. Once again, the person should talk to a lawyer before he says anything to anyone!

Other Ways of Bringing the Person to Court

Police officers do not arrest everyone who commits an offence. There are other ways the person can be brought to court and these are used more often than arrests. For summary offences (the less serious offences) the police will usually give an Appearance Notice. This paper will tell the person he must show up in court on a certain date at a certain time. The person signs this notice and gets a copy of it. Later the officer will swear an Information in front of a judge. If the person doesn't show up in court when he is supposed to, an arrest warrant will be issued. If you receive an Appearance Notice show up when you're supposed to or you will be arrested!

Another way to get a person to court is by a Summons. This order is given by a Judge and delivered to the person by the police. If the person does not come to court when he is supposed to he may be arrested. So, as with the Appearance Notice, if you receive a Summons, show up for court the day set out in the Summons.

Summary

When will a police officer arrest, get a Summons or issue an Appearance Notice?

1. a police officer will arrest if he needs to identify the person, keep evidence safe or prevent further offences.
2. a police officer will arrest if he reasonably believes that the person would not appear in court.
3. a police officer will arrest a person
   (i) he finds committing an indictable offence (a more serious crime); or,
   (ii) whom the police officer believes on reasonable and probable grounds has committed or is about to commit an indictable offence.

If a person lies to the police or won't identify himself the police will arrest. If the police believe the person will destroy evidence or that he will commit another offence then the police will arrest him.

Release Before Trial

John gets arrested for assault causing bodily harm. He is brought to the police station. Will he have to stay in jail? The rules about releasing a person before his trial are made to favour his release unless keeping him in jail is necessary for certain purposes.

In the police station the officer in charge may decide to release John. The officer in charge can release John by using one of the four different ways below:

1. *The officer in charge may release John and then arrange for a Summons (the officer will swear an Information in front of a Judge or a Justice of the Peace) to be delivered by the police to John; or,*
2. *The officer in charge may release John by giving him an Appearance Notice telling him when to appear in court; or,*
3. *The officer in charge may release John if John signs a Promise to Appear in Court; or,*
4. *The officer in charge may release John by making him sign a Recognizance. This paper is a written promise made by John that if he does not show up in court when he is supposed to he will have to pay the amount of money that is named on the Recognizance. If John signs a Recognizance for $1,000 and without a good reason does not show up in court he will owe the government $1,000.*

If John is arrested 100 miles or farther from his home he may have to pay a deposit which he will lose if he does not show up in court. If John does appear in court his deposit will be returned.

A different set of rules apply if John is arrested and charged with a more serious offence, for example, break and enter. When John is arrested, neither the police officer nor the officer in charge of the station

will be able to release him before the trial. John will be held in jail until he can be brought in front of either a Justice of the Peace or a Provincial Court Judge who will make the decision.

The simple rule about releasing a person before his trial is that the person must be released after promising to appear in court unless the Crown Prosecutor "shows cause" either that the person should be held in jail or that something more than a promise to appear is needed. The Crown Prosecutor will try to prove that just the promise to appear is not enough to release the person and the prosecutor might even say that the person should be held in jail until his trial.

John is brought to the show cause hearing (sometimes called bail court) by the police. One police officer usually reads the evidence against John and any convictions John may have had. Witnesses may be called to describe what happened. The Crown Prosecutor tries to show that John is dangerous and that if he is released he may break the law again. When both the Crown Prosecutor and John's lawyer have finished their arguments, the Judge or Justice of the Peace will decide if and on what terms John will be released. If the Judge believes that John will not show up for his trial or is likely to commit another crime he will not be released. If the Judge decides to release John he

can set the terms of John's release. John may be released:

1. *on a promise to appear in court as required; or,*
2. *on a promise to appear in court as required and to follow certain conditions much like probation. (These conditions may include reporting to the police at certain times, staying in the county, not drinking or using drugs, and staying away from certain people, for example, other people involved in the incident or witnesses who will appear in court during the trial; or,*
3. *signing a recognizance (see above); or,*
4. *signing a recognizance and showing proof that he has the money or security on hand; or,*
5. *signing a recognizance and depositing the sum of money or security with the court.*

The Crown Prosecutor must show cause to the Judge why he could not release John on a promise to appear in court as required.

Any conditions placed on John for his release must be strictly followed! If John breaks one of the conditions, for example, he does not go to the police station as ordered or he goes to a licensed restaurant when told to stay away from alcohol (even if he does not drink) he will be arrested! For his own good, John had better do what he is told!

What Happens in Court

If John is released he will be told when to appear in court again for his arraignment. The charge will be read to John and he will be asked if he understands the charge. If John does not understand he should say he does not. If he understands and says so, the Judge will ask him, "Do you plead guilty or not guilty?" John is being asked if he committed the offence. If John has not talked to a lawyer by this time, he should say he has not talked to a lawyer and ask for a delay before he answers.

DO NOT PLEAD GUILTY JUST TO GET OUT OF COURT IN A HURRY! If you do, you will get out of court, but will probably be brought to jail! If John does plead guilty he is admitting he did the crime he is charged with. No trial will be held. John will be punished for the crime.

The next time John is in court will be for the preliminary inquiry. This looks like a trial but it is not a trial. Both the Crown Prosecutor and John's lawyer may call witnesses and present evidence. The Judge will decide if there is enough evidence to send John to trial. If the Judge decides there is not enough evidence to send John to trial then John is free to go. If the Judge decides there is enough evidence for trial, he will ask John to choose how he wants to be tried. John may have the choice of having

his trial before a Judge of the Provincial Court, a Judge without a jury or a Judge and a jury. Again, John should discuss this with his lawyer who will advise him which choice to make.

In most cases, people chose to be tried by a Provincial Court Judge. John chooses this way. He tells the Judge that he elects to be tried by a Provincial Court Judge. Now, the Judge will set a date for the trial.

The Trial

The reason for having a trial is to get all the evidence and the law before the Court. The evidence is presented to the Court so that the Judge (or jury if there is one) can decide what happened. Evidence is all the information about the incident. The Crown Prosecutor will present his information first. This could include witnesses, documents and pictures. The defence lawyer can question the Crown's witnesses. This is called cross-examination. When the Crown Prosecutor finishes, the defence lawyer presents his evidence and witnesses. The Crown Prosecutor may cross examine the defence witnesses.

If the defence lawyer entered evidence, he must make his final argument before the Crown does. If the defence did not enter any evidence, the Crown makes

his final argument first. In the final arguments both sides go over their evidence and the law which helps their case. These arguments help the Judge (or jury) make up his mind. The Judge (or jury) then decides if the person is guilty. If the Judge (or jury) decides the person committed the crime he is guilty.

If the Judge (or jury) decides that John did not commit the crime he is not guilty. If the Crown Prosecutor cannot or has not proven beyond a reasonable doubt that John is the person who committed the crime then the charge against John will be dismissed. John is then free to go and will not be punished.

The Judge (or jury) decides that John is guilty of breaking and entering as charged. Now, the Judge must sentence John. The Judge will ask John if he has anything to say. The Judge will also ask the defence lawyer and the Crown Prosecutor if they have anything to say. This is called "speaking to sentence".

Types of Sentences

Judges usually have choices in the types of sentences they can give to convicted offenders.

Fines

The Judge may fine a person for some crimes and if the person does not pay the fine he may have to

spend some time in jail. An example of this is "$200 or in default 21 days". The person has the choice of paying the $200 fine or spending 21 days in jail. It is up to the person to pick what he wants to do. If the person wants to pay the money the Judge will ask if the person needs time to pay the fine. The person should speak up if he needs time to pay.

Absolute Discharge

Absolute discharges are rare but are sometimes given for less serious offences. A person pleads guilty or is found guilty first. The Court may look at the facts involved and the offence. If the person is young or there is a special problem, an absolute discharge may be given. The person is free to go and no conviction for the offence will be recorded. However, the absolute discharge will be mentioned if, in the future, the person is brought to court on another charge.

Conditional Discharge

This is the same as the absolute discharge except that conditions are placed on the discharge. The person must follow the conditions in order to receive a discharge. If he does not follow the conditions, he could be brought back to court and given a heavier sentence. Once again no conviction will be recorded but the record of the conditional discharge

would be mentioned if the person was brought to Court on another charge in the future.

Suspended Sentence

When a Judge suspends sentence, he is holding off punishing the offender for a certain length of time and placing the person on probation. The person has been convicted and will have a criminal record but if he does not get into any more trouble during the time period set by the Judge there will be no further punishment. If the person is charged with another crime or breaches his probation during the time of his suspended sentence, he can be brought to court and sentenced for the first offence as well as the second offence.

Probation Order

Probation orders can be used alone or along with other types of sentences. For example, a person could be fined and put on probation. The Judge will make orders which the person must follow. These orders could include such things as reporting every week to a probation officer, stop drinking or using drugs, or join groups such as Alcoholics Anonymous. If a person violates a condition of his probation order he could be given a heavier sentence or charged with a breach of probation.

Jail

A Judge can also sentence a person to jail. The type of crime and the facts will be looked at by the Judge when he is deciding for how long to send a person to jail. For some crimes, a Judge has no choice in deciding for how long to jail a person. The law states that the person must go to jail for at least this minimum time. An example of crime for which there is a minimum jail term is murder. If a person is found guilty of murder, he must be jailed for life!

If John is found guilty of assault causing bodily harm, the Judge could punish him by sending him to jail for up to five years. If John is found guilty of manslaughter the Judge could punish him by sending him to jail for up to the rest of his life! How bad the crime is and the story of how it was done will be considered by the Judge when deciding for how long the person should be jailed.

The length of the jail term decides to which jail the person goes. For terms under two years long the person goes to a provincial jail or correction centre. For terms over two years long the person goes to a federal jail or penitentiary.

TRAFFIC LAWS ON INDIAN RESERVES

An Indian Reserve is a federal land set apart for the use and benefit of an Indian Band. This rule

is found in the Indian Act. Being federal land, provincial traffic laws should not apply on reserves. Instead, the Courts and Parliament have decided that provincial traffic laws do apply on reserves.

Laws made by Parliament apply across all of Canada and apply to all Indians and non-Indians. As mentioned above, offences which are in the Criminal Code of Canada apply all over the country. Traffic laws in the Criminal Code such as criminally negligent driving, driving while impaired and driving while your driver's licence is suspended apply to Indians and non-Indians while driving on or off a reserve.

The provinces also make traffic laws. These laws are more often the ones which someone is charged with breaking. Examples of the areas covered include speeding, vehicle registration and insurance. The traffic laws of the province can apply to Indian reserves. The Indian Act (which was made by the government of Canada) states that the laws made by a province will apply on an Indian reserve except where the provincial laws conflict with a federal law. The Courts have decided this means that a law of the province can apply to an Indian reserve if there is not any federal law dealing with the same problem and if the provincial law does not take away from the status and the rights of Indians as Indians.

Another section of the Indian Act which deals with traffic allows the Canadian government to make laws controlling the speed, use and parking of vehicles on roads within the reserves. These rules are known as the Indian Reserve Traffic Regulations. If someone breaks these regulations, they may be fined between one dollar and fifty dollars or put in jail for up to two months. The Regulations apply to cars, trucks, snowmobiles, dune buggies, motorcycles, etc. These regulations also say that drivers on reserves must obey the laws of the province in which the reserve is located. This is why the Ontario Highway Traffic Act (the provincial law dealing with traffic) applies on Indian reserves in Ontario.

When a person is charged with a traffic offence on a reserve, the ticket he receives will mention all the laws which apply to the offence. This will include the Indian Act, the Indian Reserve Traffic Regulations, and the Ontario Highway Traffic Act (if the reserve is located in Ontario). An example of a charge of this type follows:

> that John Smith, on July 27, 1982, at X Reserve in Ontario, did operate a vehicle on a road without complying with s. 122(1) of the Highway Traffic Act of the Province of Ontario, in that he did turn left without signalling and did thereby commit an offence contrary to s. 6 of the Indian Reserve Traffic Regulations made pursuant to s. 73 of the Indian Act.

If Jchn is found guilty, he would be punished under the Indian Reserve Traffic Regulations. Most of the traffic offence relating to driving on a reserve are dealt with under the Regulations.

For more serious driving offences such as impaired driving or dangerous driving, the person would be charged under the Criminal Code. The police officer could decide to charge the person under the Criminal Code after looking at the type of crime and the facts involved. If the offence was bad enough, for example, dangerous driving, the officer would charge the person under the Criminal Code. A person found guilty of dangerous driving could be put in jail for up to two years!

FAMILY LAW

Introduction

The following summary of a number of areas in family law uses a few words that may be new to you. Those words are "registered", "registration" and "status". The first two of these words come from the Indian Act. For the purpose of this summary "registered" and "status" have the same meaning. "Registered" means that a person's name is listed with the government. Once a person's name is registered in this way they are a status Indian.

The areas of family law that will be dealt with by this summary are marriage, illegitimate birth, and adoption. The rules about marriage and illegitimate birth are set out in the Indian Act. The rules about adoption are set by court decisions.

Marriage

The first subject to be discussed is the marriage of a male status Indian. If a man marries a status woman from his own band there are, of course, no changes in her status. If a man marries a status woman from another band there will be changes. The woman will stop being a member of the band that she was born into and she will become a member of her husband's band.

If a man marries a non-Indian or a non-status Indian woman, that woman will become a member of her husband's band. She will also get all the rights of a status Indian. The children, if any, from such a marriage will be status Indians.

The second subject to be discussed is the marriage of a female status Indian. If a woman marries a status man from her own band there will be no changes in her status. If she marries a status man from another band she still keeps her status, but she will stop being a member of the band that she was born into and she will become a member of her husband's band.

If a status woman marries a non-Indian or a non-status Indian that woman will lose her status. The loss of status will happen at the time the marriage takes place.

The following list shows some of the more important results that happen when a woman loses her status.

- loss of right to live on a reserve.
- loss of right to inherit reserve lands.
- loss of right to use band services such as day care centers and nurseries.
- her children will not have status.
- loss of right to education monies for children.
- loss of right to any tax exemptions.

However, the band council may decide to let a woman keep some rights to use band services. Also, the band council may decide to allow a woman to return to the band if her marriage breaks up. But the band council does not have to let a woman return.

If a woman loses her status because she married a man with no status there is one positive thing. She has the right to her share of the band's assets. The amount of money the band has and how many band members there are.

Other than legal results from loss of status there are non-legal results. Studies have shown that social and cultural ties with the mother's side of the family

are often lost. One result of this loss is that the children often do not learn to speak their native language.

The third subject is marriage by custom. In today's society marriage by custom carries little legal force. For example, if a person needed to say that they were married for some legal purpose and all they could say is that they were married by custom, then that would not be enough.

There are a number of reasons why these rules about marriage are there. Whether these reasons are still as good today as when the rules were made is a question beyond the purpose of this booklet. In any case these rules that make status women lose their status were made so that reserve lands would be protected. The government was afraid that if non-Indians were able to get rights to reserve lands through marriage to status Indian women it would not be long before they took over the reserves.

Illegitimate Birth

Illegitimate birth means the birth of a child when the parents are not married. If the father of the illegitimate child is a status Indian and the child is a boy then the child has the right to be registered as a status Indian. If the father of the illegitimate

child is a status Indian and the mother has no status and the child is female then the child has no right to be registered as a status Indian.

If the mother of the illegitimate child is a status Indian the child has the right to be registered in the mother's band. But if the father of that child is not a status Indian that right will be taken away if the registration is protested. A valid protest must be made within twelve months of the registration, and it must be made by the proper body. In this case the proper body is the band council.

Adoption

The rules dealing with the adoption of status Indian children are straight forward. If the adopting parents are status Indians the child becomes a member of the parents band. If the adopting parents are non-Indians or non-status Indians the child keeps his rights as a status Indian.

At this point in time there is no duty on anybody to tell an adopted status child of his special rights as a status Indian. This may result in the child not using any of his benefits which flow from being a status Indian. If this happens there appears no way to get back lost benefits.

For the information of any parent that may be thinking about putting their child up for adoption there is a rule which you should be aware of. Once consent is given for the adoption that consent cannot be taken back or set aside unless it would be in the best interest of the child to do so. "Best interest" is a legal phrase which means looking at all the circumstances that would affect the child before making a decision.

HUNTING AND FISHING RIGHTS

The subject of native hunting and fishing rights is complex. It is complex because there are four different things that may affect existing hunting and fishing rights. The four things are: a) conservation laws; b) federal laws; c) treaties; and, d) provincial laws. If you or someone you know is charged for breaking some hunting or fishing law it is important to know what type of law it is.

Conservation laws are made to protect all of the following things; wildlife, land or water. You will notice that the three listed things cannot protect themselves, so it is the job of government to protect them. The government expects all people to obey conservation laws. As a result of this, hunting and fishing rights must give way to conservation laws.

One good example of a conservation law is a conservation officer closing a river to all fishing because the number of fish spawning is lower than usual. Even if the native fisherman is properly licenced to fish in that river and that river is inside a reserve, the native fisherman would be breaking the law if he kept on fishing. The important point here is that all hunting and fishing rights take a back seat to conservation laws.

Federal laws are those laws made by the government of Canada. Two such laws are the Indian Act and the Fisheries Act. The rule is that federal laws carry more weight than both provincial laws and treaty rights. This rule explains how the Migratory Birds Convention Act, which is a federal law, is above treaty rights.

The next thing, treaty rights, is very important. Treaty rights exist only if the native people of a specific area made a treaty at some time with the federal government. Most but not all, treaties list hunting and fishing rights.

If a treaty lists hunting and fishing rights then those rights are limited only by conservation laws and federal laws.

If a treaty does not list hunting and fishing rights it still may be possible to find proof of such rights. At this point it would be necessary to look

at the report on the bargaining which led up to the treaty. If this report shows that hunting and fishing rights were talked about in a way which shows that hunting and fishing rights were to be continued, then those rights will be protected. If it is not possible to find proof of hunting and fishing rights outside of a treaty and the treaty does not talk about hunting and fishing rights then that treaty does not give any special hunting and fishing rights to the band. A band of status Indians with no hunting and fishing rights set out in a treaty only have the same hunting and fishing rights as non-status Indians and non-Native people in the province.

The last things that affect native hunting and fishing rights are provincial laws. Provincial laws are made by the government of Ontario. The rule about provincial laws is found in section 88 of the Indian Act. A good way to explain how this rule works is to use two examples.

The first example uses both hunting and fishing rights as set out in a treaty, and provincial game laws. If the provincial game laws say something different than the treaty then the treaty wins. The rule is that treaty rights are above provincial laws when the two say different things about the same subject.

The second example uses provincial game laws but no treaty rights. In this case the provincial laws apply. This is so because there is nothing to block their way.

The way to understand this complex subject is to remember that conservation laws and federal laws are above treaty rights, and treaty rights are above provincial law. But if no treaty rights exist then provincial laws also apply.

It is now time to look at some rules that have developed from different cases that have come before the courts. These rules apply to hunting and fishing rights that are set by treaty, and all hunters and fish-fishermen should obey them.

First, a hunter must always be aware of other people's safety. For example, it is against the law to carry loaded guns in a car or truck. This may also apply to carrying loaded guns on a snowmobile.

Second, it is against the law to leave game behind which is fit for eating. However, if the game was left behind for a good reason there should be no problem. An example of a good reason would be an emergency of some sort.

Third, hunting and fishing rights as set out by a treaty give the right to hunt or fish for food only, in amounts large enough to feed the hunter's or

fisherman' family. These rights do not allow a Native to take game or fish for the purpose of selling it, either on or off of a reserve. Many cases of a Native fisherman selling fish or hunters selling game have been before the courts and the results have always been the same. Hunting and fishing rights do not include the right to sell the game or fish that is caught. One exception is that a Native person may sell feathers which have naturally fallen out of a bird.

Fourth, where a treaty sets out hunting and fishing rights that band of Natives also has the right to hunt and fish on unoccupied government lands. There is a rule that says roads and highways are occupied government lands. This means that there should be no hunting or fishing from the roadside. Another rule says that private property is not to be used for hunting and fishing even when it has no signs telling anyone it is private property. This rule places a duty on the individual hunter or fisherman to know who owns the land.

A number of rules have developed about land which is within a treaty area. One rule is that the federal government has the power to make the treaty area smaller. This power may be used only for special purposes, for example, using the land for a national park. If land is taken away from the treaty area then hunting and fishing rights are gone for that land which

was taken away. Another rule is that where a treaty area crosses a provincial boundary, say from Ontario into Manitoba, then any hunting and fishing rights apply to both parts of the treaty area.

This summary of law about hunting and fishing rights should give you an idea of the limits on your rights.

PROPERTY

Introduction

The Constitution Act (1867) (before it was called the British North America Act) gives the power to make laws over Indians and lands reserved for Indians to the Parliament of Canada. Parliament made the Indian Act which, among other things, gives the rules for Indians making a Will.

The rules in the Indian Act for Indians making a Will apply only to Indians who ordinarily live on a reserve. Those who do not ordinarily live on a reserve must follow the rules for making a Will which apply in the province where they own land. "Ordinarily live on a reserve" means that the reserve is the place where the person who makes the Will has always been, or has gone back to stay, or when he is away, is the place to which he usually returns to stay.

The Will

A Will is a legal paper which explains what a person wants done with his property after he dies. It only works after the death of the person who makes the Will. An Indian can make a Will if he follows the rules in the Indian Act. The Will must be in writing, and must tell what the maker of the Will wants done with his property.

The Will must also be signed by the maker. This Will cannot be used until the Minister of Indian Affairs and Northern Development has approved it.

The rules in the Indian Act also give the Minister the power to appoint or remove the executor (the person picked by the maker of the Will to carry out his wishes in giving away his property) and allow the executor to carry out the terms of the Will. With the Minister's approval, the Will may be approved by a provincial court which deals with Wills. Also, the Minister may not approve a Will when he decides:

1. that someone forced the maker of the Will to do something which the maker did not want to do; or,
2. that the maker of the will did not understand what he was doing (this means that the maker of the Will must know how much he is giving away and to whom he is giving it; or,

3. that the terms of the Will could cause hardship on the maker's family; or,
4. that reserve lands are being wrongly given away; or,
5. that he, the Minister, cannot understand exactly what the maker of the Will wants to give away or to whom the maker of the Will wants to give something; or,
6. what the maker of the Will wants to do is against public interest.

If the Minister decides not to approve a Will or a section of a Will, his decision may be challenged in the Federal Court.

Dividing Of One's Property On Death Without A Will

The Indian Act has rules which are used when an Indian dies without a Will and leave property. These rules also apply when the Minister or a Court has refused to approve an Indian's Will. These rules give all the deceased's possessions to his wife (or husband) and children.

Where the value of the possessions in the Minister's opinion is not more than $2,000, the first $2,000 worth of property shall be given to the widow and the rest shall go as follows:

(a) if the deceased had no children, the rest shall be given to the widow.

(b) if the deceased had one child, one half of the amount over $2,000 shall be given to the child and the other half shall be given to the widow.

(c) if the deceased had more than one child, two-thirds of the amount above $2,000 are split equally between the chilren and one-third shall be given to the widow.

The chart on page 39 gives examples of how property is split without a Will.

Grandchildren of the property owner can receive their parent's share of the property if the parent who is the son or daughter of the property owner is already dead. For example, John and Mary have a son, Fred. Fred marries and has a daughter, Susan. Susan is John's grandaughter. If Fred dies before his father, John, then Susan gets Fred's share of John's property when John dies. Mary, the widow, does not get a bigger share just because her son, Fred, is dead.

If the Minister feels that any of the children of the deceased are not provided for well enough he may order that all or any part of the property that would be given to the widow shall go to the children of the deceased.

When a person dies <u>without</u> leaving a wife or children, his property shall be given away as follows:

Estate Value Decided by Minister	Widow Only	Widow and One Child	Widow and more than one Child
$2,000 or less	All	$2,000	$2,000
$8,000	All	$5,000 and $3,000 widow- $2,00 and 1/2 of what is left. child- 1/2 of what is left after $2,000 given to widow.	$4,000 and $4,000 widow- $2,000 and 1/3 or what is left. children- share equally 2/3 of what is left after $2,000 if given to widow.
$26,000	All	$14,000 and $12,000 widow- $2,000 and 1/2 of what is left. child- 1/2 of what is left after $2,000 given to widow.	$10,000 and $16,000 widow- $2,000 and 1/3 of what is left. children- share equally 2/3 of what is left after $2,000 given to widow
$92,000	All	$47,000 and $45,00 widow- $2,000 and 1/2 of what is left. child- 1/2 of what is left after $2,000 given to widow.	$32,000 and $60,000 widow- $2,000 and 1/3 of what is left . children- share equally 2/3 of what is left after $2,000 given to widow.

1. to his mother and father equally if both are alive. If one parent is dead then all the property will be given to the other; or,
2. if the parents of the person are not alive, the property will be given to the person's brothers and sisters. If one of the brothers or sisters are dead but has chilren alive, the chilren can take the share their parent would have received. If all the brothers and sisters are dead but they have children alive, all the children will share the property equally; or,
3. if the person's parents, brothers and sisters and their children are dead, the property will be given to the person's closest next of kin. For example, the persons cousins (if he had any) would equally share the property.

If a child is born to parents who are not married then that child (and his children) shall be treated as a child of the mother and shall receive property only from his mother. If the child born to parents who are not married dies without making a Will and leaves no wife or children, his property shall go to his mother only. If the mother has already died, the property shall be split equally among the other children of the same mother.

What If the Man and Woman are Not Married?

Different rules apply if the man and woman are not married but are living together. For a woman to be thought of as the widow of the deceased Indian, she must prove to the Minister of Indian Affairs that:

1. she had lived with the man for at least seven years right before his death and she was not legally able to marry the man because either he or she was married to another person; or,
2. she was married in a way not recognized by law (for example, by Indian custom) but was thought of by others and the deceased as his wife; or,
3. where there had been no marriage of the deceased or of the woman to another person the woman must prove that she had lived with the deceased for a number of years right before he died, and was thought of by others and the deceased as his wife.

If the woman can prove one of the above things she can receive some or all of the deceased's goods.

Inheriting or Receiving Reserve Land

The Indian Act sets up a special system to make sure that reserves which are set apart for Indian bands are kept intact. The system sets the rules as to how and to whom the land on a reserve can be given. Any person who claims to have the right to possess

reserve land which he received by gift from the deceased or because of his relationship to the deceased, will not receive the right unless the Minister approves the transfer. Reserve land may not be given to a person who is not entitled to be a resident of the reserve.

If land is left to someone who is not entitled to live on the reserve (for example, a non-band member or a non-Indian), the right of possession of the land shall be offered for sale by the superintendent. Only people who are allowed to live on the reserve can bid for the land. The person whoever bids the highest gets the right to possess the land when the Minister approves the sale. The money from the sale is then given to the person who was given the land by the deceased, but was not entitled to live on the reserve. If the land is not sold within six months after it was offered for sale, it will be turned over to the band. The person who was supposed to get the land will receive money only for any permanent improvements he made to the land.

The Indian Act also gives the Minister the power to deal with the property of an Indian who is unfit to handle his property, for example, because of some physical or mental illness. The Minister may also make any order to make sure that the property is taken care of. If the Indian's property is not on the re-

serve the Minister can order that the law of the province apply.

Children

If property is left to an Indian child, the Minister may deal with the property or he may name another person to care for the property in the interest of the child.

Children born of parents who are not married will inherit from the mother only unless the father makes a Will which gives something to them. Adopted children are considered children of the marriage and will receive property as children born of the marriage.